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In The
Supreme Court of the United States

PETRA PRESBYTERIAN CHURCH,
Petitioner,

v.

VILLAGE OF NORTHBROOK,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITIONER'S SUPPLEMENTAL BRIEF

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SUPPLEMENTAL BRIEF OF PETITIONER

Pursuant to Sup. Ct. R. 15(8), Petitioner submits this supplemental brief to bring to this Court's attention two new cases not available at the time of the party's last filing: *Westchester Day School v. Village of Mamaroneck, et al.*, 504 F.3d 338, 2007 U.S. App. LEXIS 24267 (2nd Cir. 2007), and *Living Water Church of God v. Charter Township of Meridian, et al*, 2007 U.S. App. LEXIS 28825, 2007 Fed. App. 0832N (6th Cir., Dec. 10, 2007)[1].

These cases further demonstrate the free-for-all currently taking place among the Circuit Courts regarding the interpretation of "substantial burden" under the Religious Land Use and Institutionalized Persons Act ("RLUIPA").

Westchester Day School's ("WDS") litigation with the Village of Mamaroneck arose out of an application by the school for a modification of its general use permit to allow for an expansion and renovation project. *Westchester*, 2007 U.S. App. LEXIS 24267 at *8. The Village zoning board initially voted that consideration of the project could proceed. *Id.* At the next hearing, however, the zoning board changed their mind and rescinded their vote because of a small but vocal opposition group. *Id.* Instead of taking the next step in the zoning process, WDS chose to sue the Village for violating RLUIPA. *Id.* The district court

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[1] Although this opinion was recently filed on December 10, 2007, as "not recommended for full-text publication," it is relevant to this important question of federal law.

granted WDS partial summary judgment on the basis of the Village improperly rescinding its vote. *Id.* at *9. Instead of appealing this ruling, the Village decided to conduct hearings on WDS's application, which it eventually denied. *Id.* The Second Circuit specifically noted that instead of choosing to deny WDS's application, the Village "could have approved the application subject to conditions intended to mitigate adverse effects on public health, safety, and welfare." *Id.* at *28. This was an important observation in the Second Circuit's analysis of whether the religious exercise of WDS was "substantially burdened" by the Village. *Id.* at *29.

Petra received similar treatment by Northbrook. Petra's proposal to use their property was initially welcomed by Northbrook as the Village Board of Trustees encouraged the church to proceed after the preliminary review. *See* Petition for Writ of Certiorari ("Petition") at 8. However, after proceeding with its plans, the Village Plan Commission voted against Petra's application after hearing opposition from the public. *See* Petition at 10.

In *Westchester*, WDS ultimately prevailed in its lawsuit, with the Second Circuit concluding "that WDS's religious exercise was substantially burdened by the [zoning board's] arbitrary and unlawful denial of its application." *Westchester*, 2007 U.S. App. LEXIS 24267 at *29. The court also based its holding on "(1) whether there are quick, reliable, and financially feasible alternatives WDS may utilize to meet its religious needs absent its obtaining the construction permit; and (2) whether the denial was conditioned." *Id.* at *26. In so holding, the Second Circuit was

"mindful that the Supreme Court's free exercise jurisprudence signals caution in using effect alone to determine substantial burden." *Id.* at *20 (citing *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 451 (1988)). Indeed, the Second Circuit stands in direct conflict with the Seventh Circuit's "effectively impracticable" standard by stating that "a burden need not be found insuperable to be held substantial." *Id.* at *19 (citing, appropriately, *Saints Constantine and Helen Greek Orthodox Church, Inc. v. City of New Berlin*, 396 F.3d 895, 901 (7th Cir. 2005)). By affirmatively citing *New Berlin*, the Second Circuit suggests an internal confusion over the substantial burden standard even within the Seventh Circuit. This confusion was also recently noted by the Sixth Circuit in *Living Water Church of God v. Meridian,* 2007 U.S. App. LEXIS 28825, *18-19 (6th Cir. 2007) (noting that the Seventh Circuit set its "effectively impracticable standard" in *Civil Liberties for Urban Believers ("CLUB") v. City of Chicago*, 342 F.3d 752 (7th Cir. 2003), relaxed that standard in *New Berlin*, then returned to the high "effectively impracticable" standard in *Vision Church v. Village of Long Grove*, 468 F.3d 975, 997-1000 (7th Cir. 2006)).

If Petra were located in New York, the outcome of its case likely would have been different. When Petra bought its property in the I-1 industrial zoning district, its only option for locating in Northbrook was to apply to the Village for a Special Use Permit and a zoning map amendment because religious organizations were not permitted as a matter of right in any of Northbrook's 24 zones. *See* Petition at 7. After passing the Village's preliminary review and proceeding (as the Village urged) with its plans, Petra's application was

effectively denied. *See* Petition at 8-10. As a result, Petra was left with no alternative. Then, Northbrook changed its code to exclude all membership organizations from the I-1 industrial zoning district, including religious organizations. *See* Petition at 15. As noted by the Seventh Circuit, Northbrook could have decided the other way and allowed religious organizations in the I-1 industrial zoning district, but the Village chose not to. *See* Petition at 6a-7a.

These facts certainly would have been relevant under the Second Circuit's "substantial burden" analysis set out in *Westchester*. Although the facts are similar, the Second Circuit found WDS's religious exercise substantially burdened, but the Seventh Circuit held that Petra's was not. These different outcomes clearly show the distinct split between these Circuits in their analysis of "substantial burden" under RLUIPA. This Court's review is needed to bring order to this jumble.

With its opinion in *Westchester*, it appears that the Second Circuit has made the test for showing a "substantial burden" under RLUIPA more reasonable. In doing so, the Second Circuit has now joined the camp of the Fifth, Ninth and Eleventh Circuits, and the Washington and Oregon Supreme Courts, standing opposed to the Seventh and Tenth Circuits (and now the Sixth, as described below) and its own decision in *Rector, Wardens & Members of Vestry v. City of New York*, 914 F.2d 348, 355 (2d Cir. 1990) on the other side. *See* Petition, Question Presented I; *and see* Amicus Curiae Brief of Pacific Justice Institute at 10-11 and at 5.

In *Living Water Church of God*, 2007 U.S. App. LEXIS 28825 (6th Cir. 2007), the Sixth Circuit has joined the fray. Sending out an S.O.S., the court lamented that "[t]he U.S. Supreme Court has not yet defined 'substantial burden' as it applies to RLUIPA." *Living Water*, 2007 U.S. App. LEXIS 28825 at *14. Although the Sixth Circuit "decline[d] to set a bright line test by which to 'measure' a substantial burden," they instead laid out a "framework" within which to apply the facts. *Id.* at *25. Borrowing from both the Eleventh Circuit's standard in *Midrash Sephardi v. Town of Surfside*, 366 F.3d 1214 (11th Cir. 2004), and the Seventh Circuit's standard in *CLUB* and *Vision*, which contrasts with *Midrash*, the Sixth Circuit stated its "framework" as a question: "though the government action may make religious exercise more expensive or difficult, does the government action place substantial pressure on a religious institution to violate its religious beliefs or effectively bar a religious institution from using its property in the exercise of its religion?" *Living Water*, 2007 U.S. App. LEXIS 28825 at *25.

Applying the facts of the case within this framework, the Sixth Circuit reversed the lower district court and held that the township's actions did not substantially burden the church. *Id.* at *39-40. In doing so, however, the result is a high standard similar to that of the Seventh and Tenth Circuits, and the Second Circuit's decision in *Rector, Wardens & Members of Vestry*. And although the concurring judge acknowledged this outcome by advocating the adoption of the Seventh Circuit's *CLUB* standard, she even struggled with the Sixth Circuit's new substantial burden "framework" by pointing out that "[t]he latter

part of this formulation, concerning a hypothetical bar on the use of a religious institution's property, is so broad as to swallow the substantial-burden inquiry." *Id.* at *41. In other words, as the Circuit Courts try to determine standards, definitions and frameworks to analyze "substantial burden" under RLUIPA, they are actually creating a deeper and darker judicial labyrinth where the blind existential rluipian Minotaur is eating the very religious organizations which are seeking it for succor.

Although the Circuits are striving to find a uniform standard, this melee is intensifying rather than subsiding.[2] The confused opinions and conflicting outcomes and approaches of the Circuits serve as a supplication to this Court to bring clarity out of the chaos and to provide the protection that Congress intended in RLUIPA.

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[2] The additional recent decision in *Lighthouse Institute for Evangelism, Inc. v. City of Long Branch, et al.*, --- F.3d ---, 2007 U.S. App. LEXIS 27390 (3rd Cir., Nov. 27, 2007), evinces utter confusion about how to decide these types of land use cases with claims brought under both the First Amendment and RLUIPA. Although the *Lighthouse* opinion primarily deals with the "equal terms" provision of RLUIPA, the divided Third Circuit opinion clearly shows the importance and variety of the issues that are dependent on this important question of federal law.

Respectfully submitted,

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